Filed 6/23/09 P. v. Saldana CA5

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

HUGO ENRIQUE SALDANA,

Defendant and Appellant.

F054623

(Super. Ct. No. VCF166233B)

O P I N I O N

APPEAL from a judgment of the Superior Court of Tulare County. Gerald F. Sevier, Judge.

Jerome P. Wallingford, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Michael P. Farrell, Senior Assistant Attorney General, Louis M. Vasquez and Leanne LeMon, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

On June 10, 2006, an unidentified person shot J.S. (hereafter John) and then appellant Hugo Enrique Saldana stabbed him in the left forearm, back and head. Appellant and codefendants Eric Perez and Eddie Garza were charged with attempted premeditated murder, assault with a firearm and assault by means of force likely to inflict great injury; various enhancement allegations were attached to these counts. Perez and Garza accepted negotiated plea agreements and pled guilty to lesser offenses. Appellant exercised his right to jury trial. Perez cooperated with the prosecution and testified against appellant. The jury found appellant guilty of attempted premeditated murder (count 1), misdemeanor assault (lesser included offense of count 2) and assault by means of force likely to inflict great bodily injury (count 3); it found true special allegations attached to counts 1 and 3 that he personally inflicted great bodily injury and the offenses were committed to further the activities of a criminal street gang. (Pen. Code, §§ 667; 187, subd. (a); 12022.7, subd. (a); 186.22, subd. (b)(1)(C).)[1] Appellant was sentenced to 18-years-to-life imprisonment for count 1; concurrent terms of 180 days and 16 years were imposed for counts 2 and 3.

Appellant contends the following errors occurred during trial: (1) the court erroneously admitted testimony that before trial an unidentified prisoner cut Perez on the cheek to identify him as a snitch; (2) there is insufficient proof that the attempted murder was premeditated and deliberate; (3) the assault conviction must be reversed because the jury was not instructed on the elements of this crime; and (4) the jury was not polled about the great bodily injury enhancement attached to count 1. All of these contentions lack merit. Appellant raises two claims of sentencing error, arguing he should have been

[1] Unless otherwise specified all statutory references are to the Penal Code and all dates refer to 2006.

sentenced to 15 years to life plus three years for count 1 and the term imposed for count 3 should have been stayed pursuant to section 654. Both of these arguments are persuasive. We will modify the judgment to correct the sentencing errors and, as modified, affirm.

FACTS

John and Perez attended the same high school in 2006. At that time, Perez was a member of Lindsay North Side (LNS), which is a Northern (Norteno) affiliated gang. John was not gang affiliated. John testified that Perez disliked him because he prevented Perez from beating up another student. Also, John was friends with Johnny Chavarria, a former Northern gang member who changed allegiances and committed acts for the Southern affiliated gang. People who did not like Chavarria took it out on John "[w]hen they blew up [John's] truck" in February. John ended his friendship with Chavarria in late April or early May because John recognized that "a lot of people disliked" Chavarria and he was concerned for his safety. Also, some people told him that he was "hanging around with the wrong people, and [John] knew it was [Chavarria]." Perez testified that he argued with John throughout the school year.[2]

John testified that around 11:00 p.m. on the evening of June 9, he attended a party with his sister. He saw a group of six people at the party who he thought might be Nortenos, including Perez and Humberto Ochoa. Ochoa bumped into him and gave him a dirty look; Perez stared at him in a mean way. John was afraid that Perez and his friends were going to beat him up so he stayed by a friend, Cortay Taylor.

Around midnight, the party moved to another house on the same street. John and his sister walked toward the party's new location. When John reached the driveway, he

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[2] Perez initially told the police that he left the party before the attack on John occurred. After being charged with attempted murder, he cooperated with the prosecution. Perez pled guilty to assault with a deadly weapon with a gang enhancement. He was exposed to a maximum of four years' imprisonment. Perez had not been sentenced when he testified.

saw a large group of males wearing red clothing walking up the street. John could tell that they were Nortenos. Perez and Garza were members of this group. John heard Garza ask Perez, "[I]s this the guy?" Perez nodded affirmatively. John realized that they were talking about him. The group's demeanor became more aggressive; its members looked angry and they clenched their fists. John attempted to walk away. Garza grabbed him and tried to hit him. John ducked. Several members of the group spread out and partially surrounded John.

John ran toward an orange grove. He looked back and saw Perez and another person chasing him. He heard a loud sound and saw a flash. He looked back a second time and saw another large flash. He fell to the ground and realized that he had been shot. John pulled out his cell phone and attempted to call his sister or the police but could not get reception. He saw three people, including appellant, running toward him. They all were holding knives. Appellant swung his knife at John. John put up his hands in self-defense and appellant stabbed him in the left forearm. John fell and landed in the roadway. Appellant stabbed John in the back and in the back of the head. A vehicle drove up and everyone ran away. Two people got out of the vehicle and assisted John. John is positive that appellant is the person who stabbed him.

Perez testified that he went to the party, which was also attended by Ochoa and Garza. He did not see appellant there. When he was walking to the new location of the party with Garza and Ochoa, he saw John. Garza tapped John on the shoulder. John turned around. Garza swung at him, but missed. John began running. Another group of five to six people began chasing John. Appellant and Ricardo Picasso were members of the group of people who chased John. Perez heard five to six gunshots. Appellant, Picasso and another person appeared to be fighting with John. Perez saw appellant at a friend's house a few days later. Appellant told Perez that he stabbed John and hoped

John would die. Appellant showed Perez a little bloodstain that was on one of the shoes appellant was wearing.

Sara Anguiano testified that she saw appellant, Perez, Garza and Picasso at the party. Anguiano walked to the party's second location. She saw appellant, Garza and Picasso surround John. She was about 12 to 15 feet away and could tell by their body language that they were angry. Perez was standing by her. Garza punched John, who fell to the ground. John got up and began running. She went around to the back of the house, gathered her friends and left the party.

Taylor testified that he remained outside the house where the party began. He heard gunshots and then he saw people running. Garza was one of the people who ran. He was holding something in his hand underneath the red jersey he was wearing. Taylor's sister saw Garza and seven or eight boys running. They were wearing red attire. Taylor and his sister got into their car and drove south. They stopped when they saw someone lying in the road. Taylor got out of the car and found John lying on his back. It appeared to Taylor that John had been shot in the belly and that his arm was cut. John told Taylor that Perez injured him.

John was taken to the hospital and treated.[3]

John told police officers that Perez or "Congo" injured him. John testified that he did not initially mention appellant to the police because he was frantic and worried about his survival. He was previously acquainted with appellant. He started thinking about a person with the first name of "Hugo" about four or five days after he was injured. John mentioned the name "Hugo" name to his family while discussing suspects. His family members suggested that Hugo's last name could be Gomez. John told the police that the

[3] Dr. Guarang Pandya testified that he treated John's gunshot wound. He did not testify about the stab wounds but photographic evidence of them was presented.

person who stabbed him was named "Hugo Gomez." One of John's sisters examined a high school yearbook and determined that Hugo's last name was Saldana, not Gomez. She called a police detective and gave him this information. After receiving this information, a photographic lineup including appellant was created and John identified appellant as the person who stabbed him.

A Lindsay police officer testified that he contacted appellant in April 2003. Appellant stated that he was not an active gang member but that the gang lifestyle was attractive to him. Another Lindsay police officer arrested appellant and Picasso in April 2006. Appellant said that he had a Northern association and Picasso said that he was a Northern affiliate.

Lindsay Police Department Officer Jose Dominguez was in charge of the department's gang unit. LNS is a Norteno subset; it is the predominate gang in Lindsay. Southern gangs were disliked in Lindsay and their members had been targeted by LNS members. He opined that in June 2006 Perez was an associate of LNS and was attempting to gain membership. Picasso was an LNS member and Ochoa was an associate of LNS. He was not sure if appellant was an LNS member.

Tulare County Sheriff's Department Detective Steve Sanchez testified as a gang expert. He opined that appellant, Picasso and Garza were LNS members. Perez was an LNS member on June 9 but was now a gang dropout. Sanchez testified about two predicate criminal acts committed by LNS members and testified that the primary activities of Northern gangs in Tulare County are homicide, attempted murder, drive-by shootings and assault with a deadly weapon. Sanchez opined that the charged offenses were committed to benefit LNS.

Appellant presented three character witnesses who testified that he was not a violent person.

Dr. Joe Lopez testified as a defense gang expert. He opined that appellant associated with gang members but was not a gang member. The attack on John could have been gang related but it also could have been motivated by other factors.

DISCUSSION

I. The finding that the attempted murder was premeditated and deliberate is supported by substantial evidence.

Appellant contends the jury's finding that the attempted murder was premeditated and deliberate is not supported by substantial evidence. We disagree.

The applicable legal principles are well-known. A reviewing court must affirm the judgment if substantial evidence supports the jury's finding that the attempted murder was premeditation and deliberation. (*People v. Perez* (1992) 2 Cal.4th 1117, 1124 (*Perez*).) Substantial evidence is reasonable, credible, of solid value and legal significance. (*People v. Samuel* (1981) 29 Cal.3d 489, 505.) We consider the entire record in the light most favorable to the judgment below and presume in support of the judgment the existence of every fact that could reasonably be deduced from the evidence. (*Perez, supra*, 2 Cal.4th at p. 1124.) Premeditation and deliberation may be shown by circumstantial evidence. (*Ibid*.) It is the trier of fact's exclusive province to assess the credibility of witnesses, resolve conflicts and weigh the evidence. (*People v. Sanchez* (2003) 113 Cal.App.4th 325, 330 (*Sanchez*).) Absent impossibility or inherent improbability, the testimony of a single witness is sufficient to prove a disputed fact. (*People v. Young* (2005) 34 Cal.4th 1149, 1181.) Since the test is whether substantial evidence supports the jury's conclusion, not whether the evidence proves guilt beyond a reasonable doubt (*People v. Crittenden* (1994) 9 Cal.4th 83, 139), an appellant who attacks the sufficiency of the evidence bears an enormous burden. (*People v. Sanchez, supra,* (2003) 113 Cal.App.4th 325, 330.)

Reviewing the evidence supporting a finding of premeditation and deliberation requires consideration of all the trial evidence in light of the legal definition of premeditation and deliberation. (*Perez, supra,* 2 Cal.4th at p. 1124.) Deliberation refers to the actor carefully weighing considerations in forming a course of action; premeditation means the actor thought over those considerations in advance. (*People v. Halvorsen* (2007) 42 Cal.4th 379, 419.) "The process of premeditation and deliberation does not require any extended period of time. 'The true test is not the duration of time as much as it is the extent of the reflection. Thoughts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly ....' [Citations.]" (*People v. Mayfield* (1997) 14 Cal.4th 668, 767.)

People v. Anderson (1968) 70 Cal.2d 15 (*Anderson*) identified three types of evidence bearing on premeditation and deliberation:

> "[¶] … (1) facts about how and what defendant did *prior* to the actual killing which show that the defendant was engaged in activity directed toward, and explicable as intended to result in, the killing--what may be characterized as 'planning' activity; (2) facts about the defendant's *prior* relationship and/or conduct with the victim from which the jury could reasonably infer a 'motive' to kill the victim, which inference of motive, together with facts of type (1) or (3), would in turn support an inference that the killing was the result of 'a pre-existing reflection' and 'careful thought and weighing of considerations' rather than 'mere unconsidered or rash impulse hastily executed' [citation]; (3) facts about the nature of the killing from which the jury could infer that the *manner* of killing was so particular and exacting that the defendant must have intentionally killed according to a 'preconceived design' to take his victim's life in a particular way for a 'reason' which the jury can reasonably infer from facts of type (1) or (2)." (*Anderson, supra*, 70 Cal.2d at pp. 26-27, italics in original.)

The *Anderson* factors provide a framework in analyzing the sufficiency of the evidence of premeditation and deliberation, but a finding that all the factors are present is not required to sustain a finding of premeditation and deliberation. (See *Perez, supra,* 2

Cal.4th at p. 1125.) "The *Anderson* guidelines are descriptive, not normative. [Citation.]" (*Perez, supra*, 2 Cal.4th at p. 1125.)

Having assessed the entirety of the evidence, we find ample proof supporting the jury's finding that appellant's attempt to murder John was deliberate and premeditated. It can be reasonably inferred that appellant arrived at the party armed with a knife. The presence of the knife suggests planning and anticipation of its possible use. John testified that immediately before he was attacked, Picasso asked Perez if this was the guy and Perez nodded his head affirmatively. Anguiano testified that appellant was part of the group that was partially surrounding John about the time this exchange occurred. Immediately afterward, Garza tried to hit John. John began running. Several people chased John. Someone shot John. John fell and then appellant approached John and stabbed him three times. Appellant fled when a car approached. This chain of events supports a reasonable inference that there was some type of prearranged plan to attack John and that the attack was not random or spontaneous.

Also, appellant stabbed John in the back and head -- places that are likely to cause death. He did not swing or slash wildly at John. Rather, he targeted vital areas of John's body. The method of the killing alone can sometimes support a conclusion that the murder was premeditated and deliberate. (*People v. Hawkins* (1995) 10 Cal.4th 920, 957; *People v. Miranda* (1987) 44 Cal.3d 57, 87; *People v. Memro* (1995) 11 Cal.4th 786, 863-864.)

Furthermore, there was no indication that John provoked either the shooting or the stabbing. The lack of provocation by John leads to an inference that the attack was the result of a deliberate plan rather than a rash and explosive act of violence. (*People v. Miranda, supra,* 44 Cal.3d at p. 87.)

Finally, there was some evidence of motive to kill John. Appellant, Picasso, Perez and Garza were all either Northern gang members or associates. John and Perez had a

history of disagreements and John had stopped Perez from beating up someone. John had been friends with Chavarria, a Northern gang member who changed sides by joining the rival Southern gang. Sanchez opined that the attempted murder was committed to benefit LNS. A jury reasonably could have concluded that LNS members and associates would have considered John to be a rival or an enemy and that by killing John, appellant would increase his status within LNS and enhance LNS's general reputation for violence.

For all these reasons, we conclude that the record contains substantial evidence supporting the determination that appellant personally committed premeditated and deliberate attempted murder when he repeatedly stabbed John.[4]

II. Evidence of the attack on Perez was properly admitted.

Over defense objection on the grounds of Evidence Code section 352 and the Fifth and Sixth Amendments to the United States Constitution, Perez testified that two weeks prior to trial he was attacked in jail and cut on the cheek. Perez did not know who cut him. Perez was reluctant to testify after this attack. The court gave a limiting instruction informing the jury that this testimony was to be considered solely for the purpose of assessing Perez's credibility and it could not be considered against appellant "in any way." Sanchez subsequently testified that a cut on the mouth or cheek labels a person as a "snitch" and serves as a warning to others who might be tempted to cooperate with law enforcement.

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[4] Respondent also argues that the jury could have found appellant guilty of first degree attempted murder under the theory that he aided and abetted the unidentified person who shot John. Appellant contends that the aiding and abetting theory is unavailable because the jury found him not guilty of assault with a firearm. We need not resolve this dispute because, as demonstrated above, the evidence supports the determination that appellant's act of stabbing John was premeditated and deliberate attempted murder.

Appellant argues that this evidence should have been excluded as excessively prejudicial and that its admission infringed his federal due process right to a fair trial. We are not persuaded.

Evidence Code section 352 provides: "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." The trial court possesses great discretion in determining whether the probative value of particular evidence is outweighed by concerns of undue prejudice, confusion or consumption of time. (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124.) A court's exercise of its discretion under this section will not be reversed unless it is shown that it acted in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice. (*People v. Jordan* (1986) 42 Cal.3d 308, 316.)

No abuse of discretion occurred in this case. The contested testimony had substantial probative value. Evidence that a witness is afraid to testify or fears retaliation is relevant to an assessment of the witness's credibility. (*People v. Gonzalez* (2006) 38 Cal.4th 932, 946.) "An explanation of the basis for the witness's fear is likewise relevant to [his or] her credibility and is well within the discretion of the trial court. [Citations.]" (*People v. Burgener* (2003) 29 Cal.4th 833, 869.) The source of the threat does not matter. (*People v. Olguin* (1994) 31 Cal.App.4th 1355, 1369.) "A witness who testifies despite fear of recrimination of *any* kind by *anyone* is more credible because of his or her personal stake in the testimony." (*Id*. at p. 1368.) The jury was entitled not just to know that Perez was afraid but also to learn sufficient facts to be able to evaluate his fear. Also, there was no risk of unfair prejudice present. No evidence was presented suggesting that appellant was connected with the attack on Perez. Also, the court gave a limiting instruction directing the jury to consider the contested testimony only for the

purpose of assessing Perez's credibility. We presume that the jury followed its instructions. (*People v. Guerra* (2006) 37 Cal.4th 1067, 1115.) Accordingly, we conclude this evidence was not so inflammatory that its probative value was substantially outweighed by its potential for unfair prejudice. For the same reasons, we find that its admission did not deny appellant a fair trial in violation of his due process right. (*People v. Quartermain* (1997) 16 Cal.4th 600, 628-629 [no federal constitutional violation when evidence was not inadmissible under Evidence Code section 352].)

III. Appellate challenge to the failure to poll the jury about the great bodily injury enhancement attached to count 1 was forfeited.

After the verdicts were read, the court asked defense counsel if he wanted the jury to be polled "as to the charge, as well as each -- each special allegation separately or together?" Defense counsel replied, "Together just as to Count 1, your honor." The jury was polled on the verdict in count 1, the premeditation special allegation, the gang enhancement attached to this count and to a firearm enhancement attached to this count that was found not true. Then the clerk stated, "That's it for Count 1." The court asked defense counsel, "Is that satisfactory, Mr. Rodriguez?" Defense counsel replied, "Yes."

Appellant argues the true finding on the great bodily injury enhancement attached to count 1 must be reversed because the jury was not polled about their verdict on it. We disagree. This contention was forfeited by defense counsel's failure to bring the court's attention to its failure to poll the jury on this particular enhancement.

In *People v. Lessard* (1962) 58 Cal.2d 447 at page 452, our Supreme Court explained the salient legal principle:

> "[¶] The polling of the jury is a right available only upon the request of either party. (Pen. Code, § 1163.) The failure to make a proper request imposes no burden upon the court to poll the jury, nor in the absence of such request does a failure to so poll constitute a denial of a constitutional right. Where a jury is incompletely polled and no request is made for correcting the error, such further polling may be deemed waived by

> defendant, who cannot sit idly by and then claim error on appeal when the inadvertence could have readily been corrected upon his merely directing the attention of the court thereto." (*People v. Lessard*, *supra*, 58 Cal.2d at p. 452 [failure to poll one of the jurors waived by defense counsel's silence] ; *People v. Wright* (1990) 52 Cal.3d 367, 415 [same].)

In this case, defense counsel was aware of the charges and enhancements in this matter. He could have brought the omission of the great bodily injury enhancement to the court's attention when the court asked if he was satisfied with the polling. Instead, defense counsel affirmatively stated that he was satisfied with the polling of the jury. There is no reasoned distinction between the failure to poll one of the jurors about the verdict and the failure to poll the jurors about an enhancement. In both instances, the jury was incompletely polled and the error easily could have been corrected if brought to the court's attention. Thus, we conclude that appellate review of the court's failure to poll the jury on the great bodily injury enhancement was forfeited.

IV. Instructing on battery instead of assault was harmless error.

Appellant was charged in count 2 with assault with a firearm on John. The jury instructional conference was held off the record. The jury was instructed on simple battery as a lesser included offense to counts 2 and 3. The only lesser included offense contained in the verdict forms for counts 2 and 3 was simple assault. The jury found appellant guilty of count 3 as charged and guilty of simple assault as a lesser included offense to count 2.

Appellant argues that the assault conviction must be reversed because the jury was instructed on the elements of battery instead of the elements of assault. We agree that instructional error occurred, but find it harmless beyond a reasonable doubt.

The trial court has a sua sponte obligation to instruct on the general principles of law relevant to and governing the case. This duty requires the court to instruct on all elements of a charged offense. (*People v. Cummings* (1993) 4 Cal.4th 1233, 1311.)

"Error in omitting an element of an offense in jury instructions is subject to harmless error analysis when considering the defendant's state constitutional due process right to have the jury determine every material issue presented by the evidence. [Citations.]" (*Id.* at p. 1312, fn. 54.) However, harmless error analysis may not be applied where an instructional error essentially withdraws all of the elements of the offense from the jury's consideration and where the jury did not find the existence of facts necessarily establishing that the omitted elements had been proved beyond a reasonable doubt. (*Id.* at p. 1315.)

In this case, the use of the battery instruction instead of the assault instruction did not result in omission of any elements of assault from the jury's consideration because assault is a lesser included offense of the crime of battery. A simple assault is nothing more than an attempted battery; a defendant who commits a battery necessarily has committed a simple assault. (*People v. Fuller* (1975) 53 Cal.App.3d 417, 421.) A battery conviction subsumes an assault conviction. (*Ibid.*) The same mental state of willfulness is required to commit an assault or a battery. Therefore, the court's use of the battery instruction instead of the assault instruction did not remove any element of the offense from the jury's consideration. By finding appellant guilty of battery on John, it necessarily found the existence of facts establishing that appellant assaulted John. Therefore, we find that the instructional error did not withdraw any elements of assault from the jury's consideration and was harmless beyond a reasonable doubt.

V. The sentences imposed for count 1 and 3 must be modified.

A. The authorized sentence for count 1 is 15-years-to-life imprisonment plus a consecutive term of three years.

When the court sentenced appellant on count 1, it imposed "the term of life with the possibility of parole with that minimum parole eligibility of 18 years." Defense counsel argued the minimum parole eligibility for the indeterminate life term should be

15 years. The court disagreed, stating that "18 years to life" was the proper sentence. The abstract of judgment provides that appellant was sentenced on count 1 to 15-years-to-life plus a consecutive three-year term.

Appellant argues that an indeterminate term of 15 years to life plus a consecutive determinate term of three years is the authorized sentence for count 1. We agree. As will be explained, the sentence as pronounced is incorrect; the abstract of judgment is correct. However, the oral pronouncement of sentence controls over its synthesis in the abstract of judgment. (*People v. Mesa* (1975) 14 Cal.3d 466, 471.)

Section 186.22, subdivision (b)(5) provides that when the underlying felony is punishable by life imprisonment then the defendant "shall not be paroled until a minimum of 15 calendar years have been served." (§ 186.22, subd. (b)(5).) Section 12022.7, subdivision (a) imposes a three-year determinate term. It does not add three years to the minimum parole eligibility period. Section 669 provides that a determinate term of imprisonment must be served first when it is ordered to run consecutive to an indeterminate term. Therefore, appellant must first serve the three-year determinate term before his indeterminate sentence of 15 years to life begins. Because the three-year section 12022.7 enhancement is a determinate term, appellant has the opportunity to earn 15 percent work-time credits with respect to this portion of his sentence. However, he cannot earn work-time credits to reduce the 15-year minimum parole eligibility period. (*People v. Buckhalter* (2001) 26 Cal.4th 20, 30-32.)

Because the error does not involve any exercise of judicial discretion, the proper remedy is for this court to affirm the conviction and modify the sentence to the authorized term. (*People v. Ross* (1994) 28 Cal.App.4th 1151, 1160.) Therefore, we will modify the sentence on count 1 to an indeterminate term of 15-years-to-life imprisonment with a 15-year minimum parole eligibility period plus a consecutive determinate term of three years.

B. The sentence imposed for count 3 must be stayed.

For count 3, the court imposed a 16-year term that was to run concurrent to the sentence imposed for count 1 "by operation of provisions of … Section 654." Appellant contends and respondent concedes that when section 654 is applicable, the sentence must be stayed, not ordered to run concurrent. We accept this concession as properly made. (*People v. Bernal* (1994) 22 Cal.App.4th 1455, 1458.) The proper remedy is to modify the judgment to stay the sentence imposed for count 3.

DISPOSITION

The convictions are affirmed. The sentence imposed for count 1 is modified to an indeterminate term of 15-years-to-life imprisonment with a minimum parole eligibility period of 15 years plus a consecutive determinate term of three years. The sentence on count 3 is stayed. As modified, the judgment is affirmed. The superior court is ordered to prepare an amended abstract of judgment and to transmit it to the Department of Corrections.

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Levy, Acting P.J.

WE CONCUR:

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Cornell, J.

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Gomes, J.